Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 77-271)

Coastwise Transportation—Customs Regulations amended

Sections 4.93(b)(1) and 4.93(b)(2), Customs Regulations, amended to include Hong Kong in the lists of countries whose registered vessels are permitted to transport certain articles coastwise

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 4 – VESSELS IN FOREIGN AND DOMESTIC TRADES

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final Rule.

SUMMARY: This document amends the Customs Regulations to include Hong Kong in the lists of nations which permit vessels of the United States to transport certain articles between their ports. This amendment will provide reciprocal privileges for vessels of Hong Kong registry.

EFFECTIVE DATE: April 11, 1977.

FOR FURTHER INFORMATION CONTACT:

Patrick J. Casey, Attorney, Carriers, Drawback and Bonds Division, United States Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 27 of the Merchant Marine Act of 1920, as amended (46 U.S.C. 883), provides generally that no merchandise shall be transported by water, or by land and water, between points in the United States except in vessels built in and documented under the laws of the United States and owned by United States citizens. However, the Act also provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that the government of a foreign nation of registry does not restrict the transportation of certain articles between its ports by vessels of the United States, reciprocal privileges shall be accorded to vessels of that nation and the prohibition against the transportation of those articles between points in the United States will not apply to its vessels.

In accordance with the Act, the Customs Service has listed in section 4.93(b)(1) of the Customs Regulations (19 CFR 4.93(b)(1)) those nations which have been found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Those nations which have been found to grant reciprocal privileges to vessels of the United States in respect to the transportation of equipment for use with cargo vans, lift vans, and shipping tanks; empty barges specifically designed for carriage aboard a vessel, empty instruments of international traffic, and certain stevedoring equipment and material are listed in section 4.93(b)(2) of the Customs Regulations (19 CFR 4.93(b)(2)).

In accordance with 46 U.S.C. 883, the Secretary of State informed the Secretary of the Treasury on April 11, 1977, that Hong Kong, a crown colony of the United Kingdom, places no restriction on the transportation of the articles listed in the Act by vessels of the United States between Hong Kong and any other port under the jurisdiction of the United Kingdom. Therefore, reciprocal privileges are accorded to vessels of Hong Kong registry as of that date.

DRAFTING INFORMATION

The principal author of this document was Paul G. Hegland, Attorney, Regulations and Legal Publications Division of the Office of Regulations and Rulings, United States Customs Service. However, personnel from other offices of the United States Customs Service participated in developing this document, both on matters of substance and style.

Inasmuch as there is a statutory basis for the described extension of reciprocal privileges, and the amendments recognize an exemption from the transportation coastwise prohibition of section 27, 41 Stat, 999, as amended (46 U.S.C. 883), notice and public procedure thereon are unnecessary and good cause exists for dispensing with a delayed effective date under the provisions of 5 U.S.C. 553.

AMENDMENTS TO THE CUSTOMS REGULATIONS

To reflect the reciprocal privileges granted to Hong Kong, paragraphs (b)(1) and (b)(2) of section 4.93 of the Customs Regulations (19 CFR 4.93 (b)(1), (b)(2)), are amended by the addition of the following parenthetical material after "United Kingdom" in the lists of countries under those paragraphs: "(including Hong Kong)".

(Sec. 27, 41 Stat. 999, as amended, sec. 14, 67 Stat 516 (5 U.S.C. 301, 19 U.S.C. 1322(a), 46 U.S.C. 883))

(ADM-9-03)

G. R. DICKERSON,
Acting Commissioner of Customs.

Approved October 31, 1977
BETTE B. ANDERSON,
Under Secretary of the Treasury.

[Published in the FEDERAL REGISTER November 15, 1977 (42 FR 59063)]

(T.D. 77-272)

Notice of Recordation of Trade Name

BOHN REX-ROTARY

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 11, 1977.

On September 12, 1977, there was published in the FEDERAL REGISTER (42 FR 45725) a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name BOHN REX-ROTARY used by Bohn Rex-Rotary Division of Sheller-Globe Corp. The notice advised that prior to final action on the application, filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), consideration would be given to relevant data, views, or arguments submitted in opposition to the recordation and

received not later than 30 days from the date of publication of the notice. No responses were received in opposition to the application.

The name "BOHN REX-ROTARY" is hereby recorded as the trade name of Bohn Rex-Rotary Division of Sheller-Globe Corp., a corporation organized under the laws of the State of Ohio, located at 1505 Jefferson Avenue, P.O. Box 962, Toledo, Ohio 43697, when applied to mimeostencil duplicators, electrostatic copiers, offset duplicators, electrostatic and aluminum offset plate makers, electric stencil cutters for mimeo duplicators and spirit duplicators, manufactured in Denmark. No foreign person, partnership, association or corporation is authorized to use the trade name.

(TMK-2)

DONALD W. LEWIS,
Acting Assistant Commissioner,
Regulations and Rulings.

[Published in the FEDERAL REGISTER November 17, 1977 (42 FR 59439)]

(T.D. 77-273)

Generalized System of Preferences—Technical Atrazine

Notice that technical atrazine, produced in the manner described, will not be entitled to duty-free treatment under the Generalized System of Preferences

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C. November 14, 1977.

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Decision with respect to an American manufacturer's petition.

SUMMARY: The Customs Service has reviewed a petition filed by an American manufacturer of chemicals requesting that the duty-free treatment currently afforded under the Generalized System of Preferences (GSP) to the chemical technical atrazine, manufactured in and imported from Israel, be withdrawn. The American manufacturer argues that the imported product does not meet the requirements for duty-free treatment under the GSP. Specifically, the question presented is whether the process used to manufacture technical atrazine in Israel results in the substantial transformation

of imported raw materials into an intermediate constituent material which can be considered material produced in Israel for purposes of the GSP. The Customs Service has analyzed the process by which technical atrazine is manufactured in Israel and has concluded that the intermediate constituent material (dichloroisopropylamino s-triazine) is not marketed as such in its unrefined form and, therefore, cannot be considered a substantially-transformed constituent material produced in Israel for purposes of the GSP.

DATES: This decision will be effective with respect to merchandise entered or withdrawn for consumption on or after 30 days from the date of publication of this notice in the *Customs Bulletin.*

FOR FURTHER INFORMATION CONTACT:

Ronald W. Gerdes, Attorney, Classification and Value Division, Office of Regulations and Rulings, Headquarters, United States Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20029 (202–566–5786).

SUPPLEMENTAL INFORMATION:

BACKGROUND

Title V of the Trade Act of 1974 (19 U.S.C. 2461–65), hereinafter referred to as "the Trade Act," authorized the President to establish a Generalized System of Preferences (GSP) which would permit the duty-free entry of eligible merchandise arriving directly from designated "beneficiary developing countries." Section 503(b) of the Trade Act (19 U.S.C. 2463(b)), relating to the requirements which must be met in order for eligible merchandise to receive duty-free treatment, authorized the Secretary of the Treasury to prescribe such regulations as may be necessary to carry out the provisions of that subsection. These regulations have been prescribed and are found in sections 10.171 through 10.178 of the Customs Regulations (19 CFR 10.171–178).

The primary purpose of the GSP is to further the economic development of certain developing countries by granting a tariff preference (duty-free treatment) to the importation of certain products of those countries. In order to qualify for duty-free treatment under the GSP, the imported article must be an "eligible article" and it must arrive directly from a designated "beneficiary developing country." The eligible merchandise must also meet certain other requirements, one of which is that—in the case of an article made in a single beneficiary developing country—not less than 35 percent of the appraised value of the article (as entered into the United States) must be

attributable to (1) the cost or value of materials produced in that country, and (2) the direct cost of processing operations performed with respect to the article in that country. This requirement is found in section 503(b)(2)(A) of the Trade Act (19 U.S.C. 2463(b)(2)(A)) and in section 10.176(a) of the Customs Regulations (19 CFR 10.176(a)). In order to be "produced" in a beneficiary developing country, section 10.177(a) of the Customs Regulations (19 CFR 10.177(a)) requires the constituent materials of which the imported article is composed to be either (1) wholly the growth, product, or manufacture of the beneficiary developing country, or (2) substantially transformed in the beneficiary developing country into a new and different article of commerce.

PETITION OF AMERICAN MANUFACTURER

On December 15, 1976, a notice was published in the FEDERAL REGISTER (41 FR 54828) indicating that the Customs Service had received a petition from an American manufacturer requesting that the duty-free treatment currently afforded under the GSP to technical atrazine imported from Israel be withdrawn. The American manufacturer alleged, in support of its request, that the technical atrazine imported from Israel fails to meet the 35 percent value-added requirement of the law and regulations.

Technical atrazine is classified under item 425.10 of the Tariff Schedules of the United States (TSUS), the provision for cyanuric chloride, melamine, and other compounds containing a triazine ring. Articles classified under item 425.10, TSUS, are among those currently designated by the President as "eligible articles" for purposes of the GSP. Israel is one of the countries which has been designated a "beneficiary developing country" for purposes of the GSP. The issue raised in the petition of the American manufacturer, then, is whether the required proportion (35 percent) of the appraised value of the technical atrazine, as imported into the United States, is attributable to constituent materials produced, or to processing operations performed, in Israel.

MANUFACTURE OF TECHNICAL ATRAZINE

Information furnished by the Israeli manufacturer indicates that technical atrazine is produced in two steps from four principal raw materials: cyanuric chloride (CC), isopropylamine (IPA), monoethylamine (MEA), and sodium hydroxide (caustic). In the first step, CC is reacted with IPA to create dichloroisopropylamino s-triazine (dichloro). Caustic is added during this step to ensure a complete reaction. In the second step, dichloro is reacted with MEA to create

technical atrazine. This is also done in the presence of caustic to ensure a complete reaction.

Each of the four principal raw materials used in the production of technical atrazine, as just described, is imported into Israel. The direct cost of processing these materials into technical atrazine in Israel is alleged to be less than 35 percent of the appraised value of the technical atrazine as entered into the United States. The Israeli manufacturer contends, however, that the production of dichloro in the first step of the production of technical atrazine resulted in a substantial transformation of the CC and the IPA into a new and different article of commerce. If this contention is upheld, the dichloro would be considered a constituent material produced in Israel and its value would be included (together with the direct processing costs) in determining whether 35 percent of the appraised value of the technical atrazine, as entered into the United States, is attributable to the value of constituent materials produced, or to processing operations performed in Israel.

SUBSTANTIALLY TRANSFORMED CONSTITUENT MATERIAL

The American manufacturer concedes that dichloro differs from its component materials—that is, that it has different chemical and physical properties than either CC or IPA. However, the American manufacturer contests the notion that the dichloro resulting in the first step of the production of technical atrazine, as described above, is a substantially transformed constituent material. In particular, the American manufacturer asserts that (1) the process used to manufacture the technical atrazine is essentially a continuous process, (2) dichloro is not a chemical that is generally bought and sold, and (3) the dichloro resulting in the first step of the Israeli manufacture of technical atrazine would have to be refined (the impurities removed) in order to make shipping practicable.

The Israeli manufacturer states that its method of producing technical atrazine is a "batch" process in which each step is done in a separate reaction vessel and further contends that, even though dichloro may not normally be bought and sold commercially, it is nevertheless capable of being bought and sold and such sales have occurred. In addition, the Israeli manufacturer points out that T.D. 76–100 (41 FR 14547), in explaining the requirements of the law and regulations with respect to substantially transformed constitutent materials, requires that the transformation result in "new and different materials *or* articles of commerce" (emphasis added).

DETERMINATION

In relation to T.D. 76-100, it is our view that the words "of commerce" modify both the terms "materials" and "articles" and that in any event, ambiguity in this area is resolved by the clear language in section 10.177(a)(2) of the Customs Regulations. On the basis of the information supplied concerning the nature of the manufacturing process and in the absence of any evidence of a market for dichloro in the unrefined form, it is the opinion of the Customs Service that the dichloro is not a substantially transformed constituent material within the meaning of the law and regulations. Accordingly, the value of the dichloro cannot be included in the portion of the appraised value of the technical atrazine, as imported into the United States, which is atrributable to constituent materials produced, or to processing operations performed, in Israel.

(ADM-9-03)

LEONARD LEHMAN,
Acting Commissioner of Customs.

[Published in the FEDERAL REGISTER November 18, 1977 (42 FR 59580)]

(T.D. 77-274)

Foreign Currencies—Daily Rates for Countries Not On Quarterly List

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 10, 1977.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:

October 31, 1977	$0.2125
November 1, 1977	.2127½
November 2, 1977	.2125
November 3, 1977	.2130
November 4, 1977	.2120

Iran rial:	
October 31–November 4, 1977	$0.0141
Philippines peso:	
October 31, 1977	$0.1360
November 1, 1977	.1360
November 2, 1977	.1360
November 3, 1977	.1360
November 4, 1977	.1353
Singapore dollar:	
October 31, 1977	$0.4175
November 1, 1977	.4188½
November 2, 1977	.4185
November 3, 1977	.4180
November 4, 1977	.4165
Thailand baht (tical):	
October 31–November 4, 1977	$0.0490

(LIQ-3)

BEN L. IRVIN,
for JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

(T.D. 77-275)

Foreign Currencies—Certification Of Rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 10, 1977.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 77-260 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Ireland pound:	
November 1, 1977	$1.8440
Japan yen:	
November 1, 1977	$0.004053
November 2, 1977	*
November 3, 1977	.004036½
Switzerland franc:	
November 1, 1977	$0.4515
November 2, 1977	.4496
November 3, 1977	.4515½
November 4, 1977	.4501
United Kingdom pound:	
November 1, 1977	$1.8440

(LIQ-3)

BEN L. IRVIN,
for JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

*Rate did not very—use quarterly rate.

U.S. Customs Service

Proposed Rulemaking

The following notice of proposed rulemaking was recently published in the FEDERAL REGISTER. The Customs Service welcomes comments from the public in regard to the proposal. The comments must be in writing, addressed to the Commissioner of Customs, Attention: Regulations and Legal Publications Division, 1301 Constitution Avenue NW., Washington, D.C. 20229, and must be received on or before the date specified in the notice.

ROBERT E. CHASEN,
Commissioner of Customs.

(19 CFR Part 101)

Notice of Proposed Changes in the Field Organization of the Customs Service

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to change the field organization of the Customs Service by extending the port of entry limits of Corpus Christi, Texas, and Los Angeles, California, and by transferring jurisdiction over Morris County, New Jersey, from the Baltimore, Maryland, region to the New York, New York, region. Further, it is proposed that the port of Duluth, Minnesota, exercise supervision over the Customs stations at Crane Lake and Ely, Minnesota. The proposed changes are part of Customs' continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

DATES: Comments must be received on or before: December 15, 1977.

ADDRESSES: Comments may be addressed to the Commissioner of Customs, Attention: Regulations and Legal Publications Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Robert Schenarts, Inspection and Control Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202–566–8151).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, Customs proposes to make the following changes in its field organizations.

MORRIS COUNTY, NEW JERSEY

It is proposed to transfer jurisdiction over Morris County, New Jersey, from Region III (Baltimore, Maryland) to Region II (New York City, New York).

DULUTH, MINNESOTA

It is proposed to transfer supervisory authority over the Customs stations at Crane Lake and Ely, Minnesota, from the ports of International Falls and Grand Portage, Minnesota, respectively, to the port of Duluth, Minnesota, in Region IX (Chicago, Illinois).

CORPUS CHRISTI, TEXAS

It is proposed to extend the port of entry limits of Corpus Christi, Texas, in the Galveston, Texas, district (Region VI). As extended, the geographical limits of the port of Corpus Christi, Texas, would include all the territory within the following boundaries:

Beginning on the north at the intersection of the northwest city limits of Corpus Christi and the Nueces River and proceeding in a northerly, then easterly, then southeasterly direction along the Nueces River to the western city limits of Corpus Christi on Nueces Bay, then proceeding in a northerly direction along the western city limits of Corpus Christi to White Point Road and continuing in a northerly direction on White Point Road to its intersection with Farm to Market Road (FM) No. 1074, then proceeding in an easterly direction on Farm to Market Road (FM) No. 1074 to its intersection with Farm to Market Road (FM) No. 893, then continuing in an easterly direction on Farm to Market

Road (FM) No. 893 to its intersection with U.S. Highway No. 181, then proceeding in a northeasterly direction on U.S. Highway No. 181 to its intersection with Texas State Highway No. 35, then proceeding in an easterly direction on Texas Highway No. 35 to its intersection with the boundaries of San Patricio and Aransas Counties, then proceeding in a southeasterly direction along the boundary line between Aransas and San Patricio Counties to the Intracoastal Waterway, where the boundary between Aransas, San Patricio, and Nueces Counties intersect, then proceeding in a northeasterly direction along that portion of the Intracoastal Waterway which is the boundary between Aransas and Nueces Counties, then proceeding in a southeasterly direction along the boundary line between Aransas and Nueces Counties to the lighthouse on Harbor Island, then proceeding due east from the lighthouse on Harbor Island to the Gulf of Mexico shoreline of San Jose Island, then proceeding in a southwesterly direction along the Gulf of Mexico shoreline on San Jose Island and continuing in a southwesterly direction along the Gulf of Mexico shoreline of Mustang Island to Access Road No. 1A, then proceeding in a northwesterly direction on Access Road No. 1A to Mustang Island Road (Park Road No. 53), then proceeding in a southwesterly direction on Mustang Island Road (Park Road No. 53), to its intersection with Park Road No. 22, then proceeding in a northwesterly direction on Park Road No. 22 to its intersection with the city limits of Corpus Christi, then following the city limits of Corpus Christi in a generally southwesterly, then westerly, then northerly, then northwesterly direction to the place of beginning, all being in Texas.

LOS ANGELES, CALIFORNIA

It is proposed to extend the port of entry limits of Los Angeles, California, in the Los Angeles, California, district (Region VII). As extended, the geographical boundaries of the port of Los Angeles, California, would include the area in Los Angeles County, State of California, described as follows:

All territory with Los Angeles County bounded on the west by Topanga Canyon Boulevard, north to the intersection of the Simi Valley—San Fernando Valley Freeway, and from the intersection of the Antelope Valley Freeway and the Golden State Freeway along the corporate limits of Los Angeles to the intersection of the Foothill Freeway on the west boundary of Glendale, southeast to the San Gabriel River Freeway, south to the Orange County border to the southeast corporate limit of Long Beach.

248-427—77——8

COMMENTS

Before adopting these proposals, consideration will be given to any written comments that are submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.8(b) of the Customs Regulations (19 CFR 103.8(b)) during regular business hours at the Regulations and Legal Publications Division, Headquarters, U.S. Customs Service, 1302 Constitution Avenue, N.W., Washington, D.C. 20229.

AUTHORITY

These changes are proposed under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 190, Rev. 14 (42 FR 35239).

DRAFTING INFORMATION

The principal author of this document was Todd J. Schneider, Attorney, Regulations and Legal Publications Division of the Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development, both on matters of substance and style.

(ADM–9–03)

Dated October 31, 1977:

BETTE B. ANDERSON.
Under Secretary of the Treasury.

[Published in the FEDERAL REGISTER November 15, 1977 (42 FR 59090)]

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1199)

THE UNITED STATES v. TILTON TEXTILE CORP., No. 77-7, (—F. 2d—)

1. CLASSIFICATION OF IMPORTS–PILE FABRIC

Customs Court judgment, 77 Cust. Ct. 27, C.D. 4670, 424 F. Supp. 1053 (1976), sustaining protest against classification of "uncut velveteen greige cloth" as a pile fabric, more specifically, a plain-back velveteen under item 346.15, Tariff Schedules of the United States (TSUS), and sustaining claim to classification as a woven fabric, wholly of cotton, under TSUS item 320.14, *affirmed.*

2. ID.–STATUTORY CONSTRUCTION

Detailed Customs Court opinion, 77 Cust. Ct. 27, C.D. 4670, 424 F. Supp. 1053 (1976), concluding that pile fabrics, for purposes of tariff classification, must have (1) a weave or construction characteristic of pile fabrics, namely, an extra set of warp or filling threads, *and* (2) a raised pile, which may be wholly or partly cut or uncut, issuing from the fabric and covering the surface at least in part, fully answers Government's allegations of erroneous statutory construction.

3. EVIDENCE–CREDIBILITY, WEIGHT AND SUFFICIENCY THEREOF,

Finding by trial judge that importation in issue did not present a raised pile surface based on conflicting testimony will not be disturbed since not clearly contrary to the weight of the evidence.

4. USES–MATERIAL–UNFINISHED

Fact that pile fabric could be produced by cutting threads in the imported fabric does not justify classification as an "unfinished" pile fabric in accordance with TSUS General Interpretative Rule 10(h) where testimony that uncut fabric has limited commercial value precludes necessary finding that importation was dedicated solely to production of pile fabrics.

United States Court of Customs and Patent Appeals,
November 10, 1977

Appeal from United States Customs Court, C.D. 4670

[Affirmed]

Barbara Allen Babcock, Assistant Attorney General, *David M. Cohen*, Chief, Customs Section, *Jerry P. Wiskin* for the United States.

Siegel, Mandell & Davidson, attorneys of record, for appellee, *Steven S. Weiser*, of counsel.

[Oral argument on October 3, 1977 by Jerry P. Wiskin for appellant and by Steven S. Weiser for appellee]

Before MARKEY, *Chief Judge*, RICH BALDWIN, LANE and MILLER, *Associate Judges*.

RICH, Judge.

[1] This appeal is from the judgment of the United States Customs Court, 77 Cust. Ct. 27, C.D. 4670, 424 F. Supp. 1053 (1976), sustaining consolidated protests by the importer, Tilton Textile Corp. (Tilton), to the classification of "carded greige unbleached woven fabric, wholly of cotton, Style No. 44144," exported from Portugal. Familiarity with the trial court opinion is assumed. We affirm.

Briefly described, the importation is a fabric formed from three sets of threads. The warp threads and a first set of filling threads interlace in the usual manner to form a base fabric. A second set of filling threads interlace with a pair of warp threads and then "float" over the surface of the fabric, spanning a plurality of intervening warp threads, before again interlacing with a second pair of warp threads in the base fabric. Were these "floating" filling threads to be cut, the base fabric would remain intact, but the cut thread ends would protrude from the fabric surface. Fabrics of similar construction, once cut, are known in the trade as velveteens, but the fabric in issue is imported uncut.

The importation was classified by Customs as a pile fabric, more specifically, as a velveteen under item 346.15 of Schedule 3, Part 4 of the Tariff Schedules of the United States (TSUS) which reads in pertinent part:

Subpart A.—Knit, Pile, Tufted, and Narrow Fabrics; Braids. and Elastic Fabrics		
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*
*	*	*

	Pile fabrics, in which the pile was inserted or knotted during the weaving or knitting, whether or not the pile covers the entire surface, and whether the pile is wholly or partly cut or is not cut:	
	Of cotton:	
	* * * * * * *	
	Velveteens:	
346.15	Plain-back	25% ad val.

Tilton successfully contended below that the importation is not a pile fabric at all because in the uncut condition, as imported, it has no pile surface, that is, no cut or uncut thread elements projecting from the surface of the base fabric. Rather, it is Tilton's contention that the importation is classifiable as a woven fabric of cotton under Schedule 3, Part 3, TSUS item 320.14, as modified by Presidential Proclamation 3822, T.D. 68–9, which reads in pertinent part:

	Subpart A.—Woven Fabrics, of Cotton	
	Woven fabrics other than the foregoing, wholly of cotton:	
	Not fancy or figured:	
	Not bleached and not colored:	
	* * * * *	
320.14	of number 14	9.42 or 9.94% ad valorem [depending upon date of entry]

[2] The Customs Court, in a detailed and scholarly opinion holding for Tilton, concluded that pile fabrics, for purposes of tariff classification, must have (1) a weave or construction characteristic of pile fabrics, namely, an extra set of warp or filling threads, *and* (2) a raised pile, which may be wholly or partly cut or uncut, issuing from the fabric and covering the surface at least in part. In the opinion of the trial judge, the importation did not meet the second requirement, having, in lieu of a raised pile, "only uncut, flat filling floats which lie horizontally on and are interlaced with the ground weave." The trial judge had earlier characterized the importation as follows:

> * * * unless or until the pile picks or filling floats of an uncut velveteen greige cloth are cut to form the pile on the face of the fabric, it is not a pile fabric within the ambit of the pile fabrics heading and is precluded from classification thereunder as "velveteen."

The Government contends that the Customs Court misconstrued the statute in ignoring the plain meaning of the words there employed which purportedly require only a characteristic pile fabric weave. It is further alleged that the Customs Court's construction renders the words "not cut" nugatory as applied to filling pile fabrics (those pile fabrics wherein an extra set of filling threads forms the pile surface). We are of the opinion that these arguments are fully and satisfactorily answered in Section IV of the Customs Court's opinion.

[3] It is urged by amicus curiae that the trial court erred in not finding that what the court characterized as "flat filling floats" were, in actuality, uncut-loop pile, the testimony of the Government's witnesses on this point allegedly being the more credible. As might have been expected, the testimony as to whether or not the importation presented a pile surface was conflicting. The trial judge heard the witnesses and examined the importation in the light of their testimony. Under such circumstances, we will let stand the finding of the trial court since it is not clearly contrary to the weight of the evidence. *Nishimoto Trading Co.* v. *United States*, 62 CCPA 34, C.A.D. 1140, 508 F. 2d 1340 (1975); *Johnson* v. *United States*, 21 CCPA 129, T.D. 46464 (1933).

[4] We turn finally to the Government's argument, unanswered by the Customs Court, that if all that must be done to the importation to form a pile fabric is to cut the filling floats, then the importation was properly classified as an *unfinished* pile fabric under TSUS General Interpretative Rule 10(h) which reads:

> 10. *General interpretative rules.*—For the purposes of these schedules—
>
> * * * * * * *
>
> (h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished; * * *.

In this regard, *American Import Co.* v. *United States*, 26 CCPA 72, 74, T.D. 49612 (1938) is cited by appellant for the following proposition:

> It has long been the generally accepted rule that a thing may be classified for tariff duty purposes under the *eo nomine* provision for the article unfinished if that thing has been so far processed towards its ultimate completed form as to be dedicated to the making of that article or that class of articles alone.

The Government's witness Gray testified, however, that fabrics similar to the importation are sold and employed *uncut* for the manufacture of curtains and draperies. The Government seemingly concedes that such fabrics need not be cut to be of at least limited commercial value. We fail to see the requisite "dedication" to the formation of a pile fabric under such circumstances.

The judgment of the Customs Court is *affirmed.*

LANE, Judge, and MILLER, Judge, dissent.

(C.A.D. 1200)

AMELIOTEX, INC. v. THE UNITED STATES, No. 77-10, (—F. 2d—)

1. CLASSIFICATION–MULTIFILAMENT YARN–SARLANE

Customs Court judgment holding that certain elastomeric fibers were properly classified as monofilaments "produced from two or more filaments fused, or bonded together" rather than as grouped filaments, affirmed.

2. ID.–FUSING–BONDING–UNIFICATION

Fusing is a chemical joining to become unitary, as opposed to bonding, in which there is a joining but not a unification.

3. CONGRESSIONAL INTENT

Congress is presumed to not have used superfluous words in a statute.

4. CONGRESSIONAL INTENT–COMMERCIAL MEANING

Terms in tariff acts presumably carry the meaning given them in trade and commerce.

5. ID.

Congress intended that the definition of "monofilaments" embrace not only single filaments but also "filaments fused, or bonded together."

6. ID.

Testimony regarding the commercial usage of terms found in the Tariff Schedules is highly relevant.

7. ID.

In commercial usage, "fused" does not require melting, and "bonded" does not require the addition of adhesive.

United States Court of Customs and Patent Appeals, November 10, 1977

Appeal from United States Customs Court, C.D. 4673

[Affirmed.]

Rode & Qualey, attorneys of record, for appellant, *John S. Rode*, of counsel.
Barbara Allen Babcock, Assistant Attorney General, *David M. Cohen*, Chief, Customs Section, *Bruce M. Mitchell* for the United States.

[Oral argument on October 3, 1977 by John S. Rode for appellant and by Bruce M. Mitchell for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

MILLER, Judge.

[1] This appeal is from the judgment of the United States Customs Court, 77 Cust. Ct. —, C.D. 4673, 426 F. Supp. 556 (1976), holding that certain elastomeric fibers known as "Sarlane" were properly classified as monofilaments under items 309.03 or 309.06, Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9, depending on the denier of the fiber, rather than grouped filaments under item 309.31, as claimed by appellant. We affirm.

Background

Schedule 3, Part 1, TSUS, covers, among other things, textile fibers. Subpart E provides in pertinent part:

Subpart E Headnotes:

. . . .

3. For the purposes of this subpart—

. . . .

(b) the term "monofilaments" embraces single filaments (including single filaments of laminated construction or produced from two or more filaments fused, or bonded together), whether solid or hollow, whether flat, oval, round, or of any other cross-sectional configuration, which are not over 0.06 inch in maximum cross-sectional dimension;

. . . .

(e) the term "grouped filaments and strips" embraces two or more filaments or strips, as defined in (a), (b), (c), and (d) of this headnote, grouped together with the filaments or strips substantially parallel and not twisted, but the term does not include grouped filaments which have been subjected to processes such as twisting and untwisting, false twisting, crimping, and curling, and which are useable as yarns;

. . . .

	Monofilaments (in continuous form), with or without twist, whether known as monofils, artificial horsehair, artificial straw, yarns or by any other name:	
	Not over 150 denier:	
	. . . .	
309.03	Valued over 80 cents per pound	35% ad val.
	Over 150 denier:	
	. . . .	
309.06	Valued over 85 cents per pound	24% ad val.
	. . . .	
	Grouped filaments and strips (in continuous form), whether known as tow, yarns, or by any other name:	
	Wholly of grouped filaments (except laminated filaments and plexiform filaments):	
	. . . .	
	Other:	
309.31	Valued over 80 cents per pound	14½% ad val.

Sarlane, the trade name for appellant's product, is a spandex [1] fiber used in foundation garments, waistbands, sportswear, and sport hosiery. It is produced by extrusion of a polymeric product through a spinerette followed by passing the individual filaments through an extraction bath to remove solvent. The filaments are then gathered into bundles of eighteen and passed through a dryer maintained at 190° to 195° C. A slight tension is maintained on the filaments throughout the drying process. The bundle is then lubricated, wound, inspected, and shipped to customers. The finished product maintains its integrity as a coherent bundle and resists splaying. At trial, the parties concentrated on the drying step, with the Government contending that at this elevated temperature, albeit below the melting point of the polymer (about 240° to 245° C), fusing or bonding of the individual filaments to each other occurred; whereas, appellant argued that the filaments merely cohered at certain points along the length of the finished product. Both parties presented testimony of expert witnesses as well as photomicrographs of the product.

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[1] *Webster's Third New International Dictionary* 2181 (1971) defines "spandex" as:
any of various synthetic textile elastic fibers that are long-chain polymers composed of at least 85 percent of a segmented polyurethane.

Proceedings Below

The Customs Court observed that the statutory definition of "monofilaments" in headnote 3(b) is not limited to single filaments, but also includes "single filaments * * * produced from two or more filaments fused or bonded together," and concluded that, if fusing or bonding had occurred, the imported merchandise was correctly classified and the protest had to be denied. After reviewing the testimony of both parties, the court accepted that of the Government's witness, Dr. Couper, who stated that at the points of contact the filaments were "coalesced, which is to become unitary," and that "bonding, very clearly, is used in this sense and fusion is used loosely in this sense. But bonding and coalesence [sic], especially, refer to this phenomenon."

The court noted that appellant has the burden of proving by a preponderance of the evidence that the Government's classification was incorrect; but that appellant's witnesses could not deny the existence of the phenomena that caused Dr. Couper to conclude that the filaments had "coalesced" or "fused," particularly their incapability of being separated without causing a "webbing" or "tearing." Accordingly, the court concluded that individual filaments in Sarlane "have been fused or bonded together in the process of its production" and denied the protest.

The "Single" Filament Issue

Appellant initially urges that the Customs Court bypassed the threshold issue of whether Sarlane is a *single* filament. It contends that in order to be properly classifiable as a "monofilament," the individual filaments in Sarlane would have to be fused or bonded together into a single filament.[2] However, such a restrictive interpretation of the headnote 3 definition of "monofilament" would render the "bonded" portion of the definition superfluous, since "bonded" filaments could not form a single, unitary filament.**[2]** Fusing is a chemical joining to become unitary,[3] as opposed to bonding, in which there is a joining but not a unification.[4] **[3]** Congress is

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[2] *Webster's Third New International Dictionary* 1462 (1961) defines "monofilament" as:
a single untwisted synthetic filament (as of nylon) made in varying diameters for use in textiles, hosiery, and screens or as bristles, fishing lines, and sutures—compare MULTIFILAMENT.

[3] *Webster's supra* note 2 at 925, defines "fused" as:
1a: melted together: united by heating. . . .
Webster's supra note 2 at 250, defines "bond" as:
an adhesive that binds different ingredients together. . . . 3: to bind together or connect by or as if by bonds: as *a*: to cause to adhere firmly (as metal to glass or plastic).
Fairchild's Dictionary of Textiles 246 (1967) defines and contrasts fusing and bonding:
Fusing: The chemical joining of two fabrics to become one fabric, as opposed to bonding, in which the fabrics are joined, but do not become one fabric.

presumed not to have used superfluous words in a statute. *Platt* v. *Union Pacific Railroad*, 99 U.S. 48, 58 (1878).

[4] Such a restrictive interpretation would also be contrary to the commercially understood meaning of "monofilament"; whereas, the terms in tariff acts presumably carry the meaning given them in trade and commerce. *Barnebey-Cheney Co.* v. *United States*, 61 CCPA 10, C.A.D. 1110, 487 F. 2d 553 (1973); *Hummel Chemical Co.* v. *United States*, 29 CCPA 178, C.A.D. 189 (1941). Moreover, the *Tariff Classification Study*, Schedule 3 at 515 (1960), clearly indicates that Congress was made aware that certain spandex filaments had been produced which, although originating in production as multiple filaments, were caused to so coalesce or adhere to each other that the finished product was utilized by the textile industry as a monofilament.

Although, as pointed out by appellant, Congress was made aware of such functional monofilaments in a proposed amendment by the Man-Made Fiber Producers Association (MFPA) to the definition of "grouped filaments" to exclude such functional monofilaments from that item, and did not adopt the amendment, we are not persuaded that this evidenced Congressional intent to include filaments such as Sarlane under the "grouped filaments" item. While the MFPA proposal was not accepted, the definition of "monofilaments," which theretofore had been restricted to single, unitary filaments,[5] was amended to embrace "filaments fused, or bonded together," as now provided. Also, we note the similarity of the language in the MFPA proposal [6] ("coalesce" and "adhere") to the headnote language of "fused" (equated by appellant's own witness with "coalesced" [7]) and "bonded" (synonymous with "adhere" [8]). **[5]** It is clear that Congress, instead of adopting the MFPA proposal to *exclude* functional monofilaments from the "grouped filaments" classification, broadened the definition of "monofilaments" to embrace such products.

Appellant further argues that Sarlane is not a "functional monofilament" because "it exhibits characteristics of a true multifilament in that its fibers act independently." However, the issue is whether the individual filaments in Sarlane are "fused, or bonded together," not whether they exhibit multifilament characteristics.

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[5] *Tariff Classification Study*, *supra*, at 285.
[6] *Id.* at 515.
[7] Testimony of Golub:
Q. What does the term coalesced mean?
A. Coalesced is the equivalent of fused.
[8] See note 4, *supra*.

The "Fused or Bonded Together" Issue

Dictionary definitions of "fused" and "bonded," *supra* notes 3 and 4, indicate that fusing requires heating and melting, while bonding requires the presence of an adhesive substance. **[6]** However, since we are concerned with the meaning of "fused" and "bonded" in the fiber industry for tariff purposes, testimony regarding the commercial usage of those terms is highly relevant. See *E. Dillingham, Inc.* v. *United States*, 61 CCPA 34, C.A.D. 1114, 490 F. 2d 967 (1974).[9] Appellant's witnesses, Drs. Peters and Golub, both admitted that fusing can occur below the melting point of the filaments. Dr. Golub also testified that a phenomenon known as "self-bonding" can occur which will result in the fusing, coalescing, or bonding of the filaments together without addition of any extra adhesive substance. **[7]** Thus, it is apparent that, in commerical usage, "fused" does not require melting, and "bonded" does not require the addition of adhesive.

Turning to the process from which Sarlane is produced, Dr. Peters admitted that "flow or creep" (*i.e.*, "molecular movement, slippage") of spandex-type fibers could occur at the temperatures used in the drying stage. He also testified that the filaments were under slight tension as they passed through the dryer.

Appellant challenges the conclusion of the Customs Court and the testimony of Dr. Couper that there was flow or movement of material *between* Sarlane filaments during the drying stage, arguing that its witnesses were discussing only creep or flow *within* individual filaments. However, Dr. Peters testified that his own patent, which was directed to a slightly different process of producing spandex fibers, taught that fusing occurred *between* individual filaments at temperatures below the melting point of the spandex.[10] Dr. Golub testified that all that occurred during the Sarlane drying step was that the individual filaments "cohered" (*i.e.*, touched), but that no flow occurred between filaments. However, the photomicrograph exhibits clearly show a tearing or ripping of the Sarlane filaments when separated, and Dr. Couper's testimony on the appearance of web-like material at the points of tearing on the Sarlane filaments stands largely unrebutted. If the "cohesion" theory of Dr. Golub were correct, separation of the filaments would not result in a ripping or

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[9] Since the common meaning of tariff terms is a question of law, testimony of witnesses on that question is not binding on this court. See *United States* v. *Norman G. Jensen, Inc.*, 64 CCPA —, C.A.D. 1183, 550 F. 2d 662 (1977).

[10] The Peters patent uses more solvent than is present in the filaments of Sarlane at the drying stage to render the spandex to a semi-plastic state in which fusing occurs. However, Peters did admit that heat and solvent were equivalent in obtaining fusing of filaments.

tearing; rather, their surfaces would remain intact—much like the metal surfaces in Golub's "Johanson block" analogy.[11]

We are satisfied that the Customs Court did not err in concluding that individual filaments in Sarlane were "fused, or bonded together" to the extent that such filaments were thereafter no longer independent filaments and that appellant failed to carry its burden of proving the Government's classification incorrect.

Accordingly, the judgment of the Customs Court is *affirmed*.

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[11] Johanson blocks are flat plates of finely polished metal. When put together face-to-face, they cannot be pulled apart; they must be slid apart. Individual filaments of Sarlane are quite difficult to separate (Peters could only separate them into three bundles, not the 18 individual filaments) and cannot be made cohesive again by merely pushing them back together.

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4718)

THE AMERICAN GREINER ELECTRONIC, INC. *v.* UNITED STATES

Watch timers—Export value

EXPORT VALUE—SELECTED PURCHASER—FAIRLY REFLECTS MARKET VALUE—PROOF

When an importer, on the basis of sales to a selected purchaser, seeks to substitute export value for constructed value as the basis of appraisement, there still must be some credible proof that the sales fairly reflect market value.

Court Nos. R61/20887, etc.

Port of New York

[Judgment for defendant.]

(Decided November 4, 1977)

Barnes, Richardson & Colburn (*Joseph Schwartz* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: These actions, consolidated for trial,[1] involve the valuation of variously described watch timers and parts exported from Switzerland in the years 1958, 1959, 1961 and 1962. The merchandise was manufactured and exported by Greiner Electronic, Ltd., of Langenthal, Switzerland. It was imported into the United States by the American Greiner Electronic, Inc., Stamford, Connecticut.

Pursuant to section 402 of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956,[2] the merchandise was appraised at various unit values on the basis of constructed value.[3] The preferred statutory basis for valuing imported merchandise is export value.[4] Plaintiff alleges that the merchandise in these consolidated actions should all be appraised at the values represented by the invoice prices on the preferred export value basis, as provided for in section 402, which defines export value, including definitions.[5]

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[1] The consolidation covers 42 separate actions nominally known as appeals for reappraisement.
[2] 19 U.S.C. § 1401a.
[3] 19 U.S.C. § 1401a(d).
[4] 19 U.S.C. § 1401a(b).
[5]

Export value

(b) For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of what ever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * * * *

Definitions

(f) For the purposes of this section—
(1) The term "freely sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered—
(A) to all purchasers at wholesale, or
(B) in the ordinary course of trade to one or more selected purchasers at wholesale at a price which fairly reflects the market value of the merchandise,
without restrictions as to the disposition or use of the merchandise by the purchaser, except restrictions as to such disposition or use which (i) are imposed or required by law, (ii) limit the price at which or the territory in which the merchandise may be resold, or (iii) do not substantially affect the value of the merchandise to usual purchasers at wholesale.

The appraisement on the basis of constructed value is presumed to be correct.[6] Presumptively, therefore, as defined above, there was no export value for the merchandise at the times exported. *Mannesmann-Meer, Inc.* v. *United States*, 58 CCPA 6, 8, C.A.D. 995, 433 F. 2d 829, 831 (1970). In challenging the appraisement, plaintiff must prove the price, at the times of exportation to the United States, at which the imported merchandise was freely sold in Switzerland in the ordinary course of trade for exportation to the United States.

The only evidence on the issue of export value in this case is the testimony of the president of Greiner Electronic, Ltd., Mr. Rudolph Greiner, Jr. of Langenthal, Switzerland. He testified that in 1958, after college, he went to work in the office of Swiss Greiner and also did some work in the laboratories at the plant site to broaden his technical background; that he stayed with Swiss Greiner until 1959; that in 1960 he went to work for American Greiner and remained there two years as office manager and service manager; that he returned to Swiss Greiner in 1962 and remained there until 1965 doing, successively, public relations, sales administration, pricing, invoicing, and export paper work.

Mr. Greiner further testified that Swiss Greiner organized American Greiner to service its products in the United States markets; that the business of American Greiner was to buy equipment manufactured by Swiss Greiner and then sell and service the equipment in the United States; that in the years 1958 through 1962, Swiss Greiner sold watch timers and parts to no one but American Greiner; that Swiss Greiner and American Greiner are not related companies; that they do have a common stockholder, namely, his father who at the times of exportation owned 98 percent of the stock in Swiss Greiner and 100 percent of the stock in American Greiner.

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(2) The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the merchandise undergoing appraisement, have been normal in the trade under consideration with respect to merchandise of the same class or kind as the merchandise undergoing appraisement.

• • • • • • •

(4) The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which export value, United States value, or constructed value, as the case may be, can be satisfactorily determined:

(A) The merchandise undergoing appraisement and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, the merchandise undergoing appraisement.

(B) Merchandise which is identical in physical characteristics with, and was produced by another person in the same country as, the merchandise undergoing appraisement.

(C) Merchandise (i) produced in the same country and by the same person as the merchandise undergoing appraisement, (ii) like the merchandise undergoing appraisement in component material or materials and in the purposes for which used, and (iii) approximately equal in commercial value to the merchandise undergoing appraisement.

(D) Merchandise which satisfies all the requirements of subdivision (C) except that it was produced by another person.

[6] 28 U.S.C. § 2635.

Asked if he was familiar with the manner in which the selling prices from Swiss Greiner to American Greiner were arrived at, Mr. Greiner testified that he was present and participated at most of the negotiations between Mr. Dupont, manager of American Greiner, and Mr. Lenzin, sales manager for Swiss Greiner. When questioned about the negotiations, Mr. Greiner responded as follows (R. 20–23):

> Q. Was there a basis used in determining the selling price—withdrawn. I show you the Court file in R61/20887. Will you please look at the invoice in this case—take it out of the envelope, please. What does that case cover?—A. That covers two instruments, Super-Spiromatic with four plates which are accessories to that instrument.
>
> Q. What is the date of that invoice?—A. September 30, 1959.
>
> Q. And what is the invoice price of that merchandise?—A. 13,450 Swiss Francs.
>
> Q. What is the unit price?—A. 6,225 Francs, for the machine.
>
> Q. Do you know how that price was determined?—A. Yes.
>
> Q. Tell us how it was determined—excuse me, I will ask another question. Is that the result of your participation in these various negotiations?—A. Yes, it was.
>
> Q. That you have been talking about?—A. Yes.
>
> Q. How was that price determined?—A. This price was determined in a negotiation between Greiner Limited and American Greiner, a negotiation that was to assure a fair profit to Swiss Greiner and to American Greiner.
>
> Q. Do you know whether that was the basis of the negotiations for the remaining shipments that were exported?—A. That was the basis for all these exports that we talking about.
>
> Q. What do you say the objective was in these negotiations?—A. To come to a price that allows Swiss Greiner and American Greiner both to make a fair profit.
>
> Q. And would you tell us whether that objective was realized?—A. For American Greiner we did not make the money that we expected to make.
>
> Can you tell us the reason or reasons for that?
>
> * * * * * * *
>
> THE WITNESS: The expenses, the selling expenses and servicing expenses of American Greiner were higher than planned and the market was not as big as budgeted and because the competition was stiffer than expected.

Additionally, Mr. Greiner testified that there were other companies, competitors in Switzerland, in the same business as Swiss Greiner. (R. 26.)

On the cross-examination relevant to the negotiations between Swiss Greiner and American Greiner, Mr. Greiner restated that he did not participate in each and every negotiation involving prices, but did participate in most of them; that his father participated in some of the negotiations and while theoretically, his father had the

final say, as a practical matter his father delegated the power to negotiate; that Mr. Lenzin was under obligation to make money for Swiss Greiner and Mr. Dupont had to make money for American Greiner; that in 1960 and 1961 he and Mr. Dupont worked together; that sometimes Mr. Dupont went to Switzerland and sometimes Mr. Lenzin and his father came to the United States and they would all get together and negotiate.

The record, in my opinion, establishes that in the period 1958 through 1962, Swiss Greiner did not sell or offer to sell the exported merchandise to anyone but American Greiner. Defendant's position to the contrary,[7] at the times of exportation, I find, therefore, that American Greiner was a "selected purchaser" within the meaning of section 402(f)(1)(B) of the Tariff Act of 1930, as amended, *supra*, footnote 5. Assessing and weighing the testimony of Rudolph Greiner, Jr., I conclude that it does not probatively establish that the invoice prices at which Swiss Greiner sold the watch timers and parts to American Greiner fairly reflect the market value of that merchandise.

The new starting point of judicial evaluation of issues involving sales to selected purchasers is *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139, 505 F. 2d 1400 (1974). In that case, upon consideration of the legislative history and intent of section 402, as amended by the Customs Simplification Act of 1956, the court of appeals stated as follows:

> From the foregoing, we conclude that Congress clearly intended that export value be determined by considering only the exporting country's market for exportation to the United States and that sales at wholesale to exclusive or selected agents be used in determining export value if the prices fairly reflect the market value. *United States* v. *Acme Steel Co.*, 51 CCPA 81, C.A.D. 841 (1964) is hereby overruled to the extent that it approved consideration of sales in the domestic market of the exporting country in the determination of export value. * * * '62 CCPA, p. 32.]

The *Wood* decision has rendered obsolete much, if not all, of the case law that preceded it as to the kind of proof considered relevant in determining that a price to a selected purchaser fairly reflected market value.[8]

This case poses the difficult question raised by the *Wood* decision, that is, can a price to a selected purchaser fairly reflect market value when, as customs officials stated in commenting on the *Wood* decision:

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[7] Based on Greiner Sr.'s control of the two companies, defendant argues that American Greiner was an agent and did not buy the merchandise from Swiss Greiner. There is, however, no evidence that ownership of the imported merchandise was not transferred from Swiss Greiner to American Greiner for a valuable consideration. *J. L. Wood* v. *United States*, 62 CCPA 25, 33, C.A.D. 1139, 505 F. 2d 1400, 1406 (1974).

> * * * the "necessary market evidence" is not available; i.e., when there are sales only to related selected purchasers, or sales only to one unrelated selected purchaser. Then the criterion applied by the court is not available, for there would be no "market" for export to the United States outside of the sale in question. This leaves three possible courses of action: (1) to automatically accept the price as establishing export value, (2) to automatically reject the price for lack of evidence that it fairly reflects the market value; or, (3) to use other available evidence for comparison purposes. [10 Cust. Bull. 207, T.D. 76–118 (1976).]

It goes without saying that the law, namely, section 402(f)(1)(B), precludes automatic acceptance or rejection of a sales price to a selected purchaser. The difficulties of proof inherent in the statutory concept of price to a selected purchaser which fairly reflects market value, notwithstanding, it is my opinion that there still must be some credible proof that price, on a sale to a selected customer fairly reflects market value, when a plaintiff seeks to substitute export value for constructed value. *Cf.*, *Mannesmann-Meer, Inc.* v. *United States*, 57 Cust. Ct. 697, 702, R.D. 11243 (1966), *aff'd on review*, 62 Cust. Ct. 1023, A.R.D. 253 (1969), *aff'd on appeal*, 58 CCPA 6, C.A.D. 995, 433 F. 2d 829 (1970). If it is ever possible to determine that invoice prices to a "selected purchaser at wholesale" "fairly reflect the market value" without evidence of prices in other kinds of transactions for comparison purposes, that is so only when the relations between buyer and seller are clearly set forth and are such as to warrant an inference that they dealt at arm's length. *National Carloading Corporation* v. *United States*, 57 Cust. Ct. 758, 759, A.R.D. 215 (1966).

As the record here fails to produce any credible standard for determining whether invoice prices fairly reflect market value, plaintiff, in my opinion, has failed to prove an export value. Plaintiff asks the court to find that the invoice prices in these consolidated actions fairly reflect market value because:

> The record establishes without dispute that the selling prices were the result of negotiations between Greiner Electronic Ltd. and American Greiner Electronic, Inc. The only witness in the case, Rudolph Greiner, Jr., was present at most of the negotiations which took place between Mr. Dupont on behalf of American Greiner and Mr. Lenzin of Greiner Ltd. * * * Mr. Greiner testified that the object of the negotiations was to assure a fair profit to Swiss Greiner and to American Greiner, that is a price which allowed both Swiss Greiner and American Greiner to make a fair profit * * *. [Plaintiff's brief, p. 17.]

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[4] See, Strum, *A Manual of Customs Law* (Supp. 1976), p. 26.

Plaintiff further argues that the negotiations were *bona fide* because both Mr. Lenzin and Mr. Dupont were under an obligation to make a profit for their respective firms, and defendant has failed to come forward with any evidence which contradicts or weakens the importer's case. In truth, however, what defendant has or has not done, is not as important as plaintiff's proof. Ultimately, plaintiff's case must rest on the strength of its own evidence, assessed in practical terms, considering such factors as completeness, adequacy of bases, and possible motives to deceive. *Mannesmann-Meer, Inc.* v. *United States*, 58 CCPA 6, 8, C.A.D. 995, 433 F. 2d 829 (1970).

In *Mannesmann-Meer*, the court of appeals approvingly analyzed the rationale of the lower court as follows:

> * * * First, the appraiser's action is presumed correct. Inherent in the appraiser's use of constructed value under 19 U.S.C. 1401a(d) was the finding that export value could not be satisfactorily determined. See 19 U.S.C. 1401a(a)(3). * * * In a practical evaluation of appellant's evidence, the tribunals below found the following weaknesses, among others, therein:
>
> 1. There was no evidence of specific transactions from which the court could judge the correctness of affiant's statement that the price charged was "normal."
>
> 2. There was no specific evidence as to how competitive conditions affected the price charged. [58 CCPA, pp. 8–9.]

The same rationale applies to this record. Assessing and weighing plaintiff's testimony in practical terms of completeness and his knowledge of the negotiated prices, the testimony that the prices were "negotiated" raises more questions than it answers. Essentially what is missing is evidence of the specific considerations and factors that affected the negotiated prices. There is nothing wrong with a price fixed so as to assure a profit to both sides. But from the standpoint of Mr. Greiner, Sr., who owned 98 percent of the stock in Swiss Greiner and 100 percent of the stock in American Greiner, profit earned on one side of the business transaction might be more beneficial than profit earned on the other. In short, the profit motive of the seller and buyer alone does not establish that, in this case, the prices fairly reflect market value. There is no probative evidence of the manner in which the invoice prices were determined, and whether competitive conditions affected the invoice prices, or even whether the profit represented a reasonable profit in the ordinary course of trade.

Plaintiff has not overcome the presumption of correctness that attaches to the appraisements. I am not unmindful of the recent decision in *D. H. Baldwin Co. et al.* v. *United States*, 78 Cust. Ct. —, C.D. 4704, 432 F. Supp. 1351 (1977), appeal 77–29, and as an appeal is still pending make no comment upon it here.

I find as facts:

1. That the merchandise of these appeals consists of watch timers and parts manufactured by Greiner Electronic, Ltd., of Langenthal, Switzerland, a firm in which, at the times of exportation in 1958, 1959, 1961 and 1962, a Mr. Greiner, Sr. held 98 percent of the capital stock.

2. That the merchandise was imported by The American Greiner Electronic, Inc., of Stamford, Connecticut, a firm in which, at the times of exportation, Mr. Greiner, Sr. held 100 percent of the capital stock.

3. That, at the times of exportation, Swiss Greiner sold the merchandise of these appeals only to American Greiner.

4. That the merchandise was appraised on the basis of constructed value, as defined in section 402(d), Traiff Act of 1930, as amended by the Customs Simplification Act of 1956.

5. That plaintiff claims there is an export value, as defined in section 402(b), as amended.

I conclude, as a matter of law:

1. That plaintiff's proofs failed to overcome the presumption that constructed value, as defined in section 402(d), as amended, is the proper basis for valuation of the merchandise in these consolidated appeals for reappraisement.

2. That the record does not establish an export value for the merchandise, as defined in section 402(b), as amended.

3. That the constructed values are the appraised values.

Judgment will be entered accordingly.

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U.S. Customs Service

Court of Customs and Patent Appeals

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